

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Revision of Procedures Governing Amendments)	MB Docket No. 05-210
To FM Table of Allotments and Changes of)	RM-10960
Community of License in the Radio Broadcast)	
Services)	

To: The Commission

COMMENTS OF BOOTH, FRERET, IMLAY & TEPPER, P.C.

The communications law firm Booth, Freret, Imlay & Tepper, P.C. (BFITPC), hereby respectfully submits its comments in support of the Commission's proposal in the instant proceeding to permit AM and FM licensees and permittees to change their specified community of license by minor modification application in accordance with normal Section 307(b) policies. These comments are timely filed, inasmuch as the above-captioned Notice of Proposed Rule Making, FCC 05-120, released June 14, 2005 was published in the Federal Register August 3, 2005. Accordingly, the comment date is October 3, 2005. For its comments, which are limited to the rules governing AM broadcast stations, BFITPC states as follows:

1. Under present rules, an AM broadcast licensee or permittee proposing to change the community specified in the license or construction permit must do so by means of a major change application, 47 C.F.R. § 73.3571(a)(1), which can only be filed pursuant to an auction filing window. 47 C.F.R. § 73.3571(h). As the Commission has previously held, these filing windows need not be opened on any fixed schedule. The opening of filing windows for new and major modification or major change applications in the AM broadcast service is infrequent and unpredictable. The most recent window

occurred in January of 2004. The previous one was four years earlier. It is unclear when the next window will be opened.

2. At the same time, the Commission allows only three years within which to construct any broadcast station or complete modifications to broadcast stations (47 C.F.R. § 73.3598). The Commission has not exercised its authority to preempt local land use regulations that preclude construction of broadcast facilities. AM broadcast stations are routinely subject to displacement by expiring leases, land rezoning, changes in land uses, and increasing development of formerly open land. Because large parcels of land are usually required when existing AM stations are displaced, these stations are often unable to find nearby replacement transmitter sites. Worse, when new AM permittees do find land for a transmitter site, they are often unable to obtain land use approval for construction due to opposition by neighbors and local officials.

3. Land use approvals, be they by means of building permit applications, conditional use permits (a/k/a Special Exception or Special Use Permits), variance hearings, or rezoning applications cannot normally be granted without an FCC construction permit in hand. A Commission-issued construction permit is often a prerequisite for land use approval. The Commission has in the past accommodated these circumstances by permitting, where necessary, modification of licenses or construction permits to allow a new transmitter site. However, these accommodations are of no help at all where an existing station, displaced from its transmitter site, must be off the air for more than 365 consecutive days, or where a permittee for a new unbuilt station is unable to move to a new site and loses its construction permit after three years. In many cases, a station cannot move to an available transmitter site and still cover its community of

license with a daytime city-grade signal and/or a nighttime interference-free contour. A major change or major modification application (for a construction permit) is then necessary, specifying a new community of license. Without the ability to file such an application outside a filing window, the ability to find a replacement transmitter site is totally dependent on the vagaries of the AM filing window schedule. Therefore, given the increasing difficulty of obtaining sites and land use approvals for AM broadcast stations, the loss of a site or an adverse zoning decision is often the kiss of death for that station or permit.

4. The Commission's rules (47 C.F.R. § 73.3598(b)) do have a provision for "tolling" of a construction permit under certain circumstances. There is no similar relief available to a displaced AM licensee, who must return the station to the air within one year or lose the license without recourse. In the case of a displaced AM permittee, the options offered by the Commission are little better. These include (1) finding another site where land use approvals might be obtained, in an area where the station could still provide the requisite signal coverage of the community of license; or (2) litigate against the municipality that has denied the land use authority and ask the Commission to toll the construction permit during the litigation. The former may be impossible as a matter of fact, and the latter is often impractical, expensive, and uncertain. Many local land use decisions cannot be reasonably appealed.

5. The combination of the Commission's rules for AM broadcast licensees and permittees, and the modern realities of land use regulation, especially in urban and suburban areas, have created nightmarish situations for AM broadcast licensees and permittees. The value of land, having skyrocketed in recent years, has caused many

landowners to change their plans. Almost invariably, this works to the disadvantage of the AM broadcast licensee or permittee. The combination of these events and the growing regulation of broadcast antennas by local land use officials make relief for broadcast licensees and permittees necessary. The simplest means of alleviating the problem is to permit changes of communities of license by both licensees and permittees by minor change and minor modification applications. This will provide the flexibility to allow AM permittees and licensees to move their facilities to a location where land is both available and can be approved to initially construct, or relocate, an AM broadcast station. It is critical that the Commission permit both licensees and permittees of unbuilt facilities this regulatory accommodation. It is also consistent with fairness, and in the public interest. The alternative is for the Commission to preempt local land use regulation of broadcast towers and antennas. In this area, it has previously expressed a strong reluctance to act, as the result of a claimed lack of expertise in land use regulatory matters involving large broadcast antennas.

Therefore, the foregoing considered, the communications law firm of Booth, Freret, Imlay and Tepper, P.C. respectfully suggests that the Commission adopt the proposal in the Notice to permit changes of community of license by both licensees and by permittees of unbuilt AM facilities by minor change and minor modification

applications, which would be processed on a first-come, first-served basis, and adjudicated in accordance with normal Section 307(b) policies.

Respectfully submitted,

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